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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

156.81 ACRES OF LAND, MORE OR LESS, SITUATE IN COUNTY OF MARIN, STATE OF CALIFORNIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED*

Whether interest in an action for condemnation pursuant to 40 U.S.C. 257 runs from the date the award is paid and the government obtains possession and title to the land, whether or not the land is improved.

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*Additional defendants below were: Frank W. Lynch, Ellenora C. Lynch, Edward R. Fitzsimmons, Elizabeth S. Fitzsimmons, Karl Melchers, Karen W. Melchers Stackhouse and Helene Goode Stackhouse.

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156.81 ACRES OF LAND, MORE OR LESS, SITUATE IN COUNTY OF MARIN, STATE OF CALIFORNIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is reported at 671 F.2d 336. The opinions of the district court (App. C and D, *infra*, 15a-19a) are unreported.

The judgment of the court of appeals was entered on March 12, 1982, and rehearing was denied on June 1, 1982 (App. B, *infra*, 13a-14a). On August

18, 1982, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

40 U.S.C. 257 provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

40 U.S.C. 258a provides in pertinent part:

> In any proceeding in any court of the United States * * * for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States.
>
> * * * * *
>
> Upon the filing said declaration of taking and of the deposit in the court, to the use of the per-

sons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court.

STATEMENT

1. Two types of condemnation are provided for by statute: under the Declaration of Taking Act, 40 U.S.C. 258a, the government may obtain title and possession immediately by filing a declaration of taking and depositing with the court the estimated amount of just compensation. If the judicially determined amount of just compensation is greater than the amount deposited, the government must pay the difference with interest from the date the declaration of taking is filed; no interest is due on the amount originally deposited. The alternative condemnation method, "straight condemnation," is initiated by filing a complaint in condemnation pursuant to 40 U.S.C. 257. The government makes no deposit with the court, and the landowner retains possession and title until the judicial proceedings have been completed and the government has paid the judgment awarded.

This case raises the question of when interest begins to accrue in a straight condemnation case.

2. On July 12, 1976, the United States filed a complaint pursuant to 40 U.S.C. 257 to condemn property located in Marin County, California, for inclusion in the Golden Gate National Recreation Area.[1] Beginning on June 20, 1977, a jury trial was held to determine the amount of just compensation to be paid for the interest condemned by the United States. On July 14, 1977, the jury reached a verdict of $3,799,400. On November 9, 1977, final judgment was entered in favor of the landowners in that amount.

On November 17, 1977, the United States moved for a new trial, or, in the alternative, for remittitur, followed by extensive briefing by the parties. The motion was denied by the district court on June 20, 1978, and, on August 11, 1978, the United States filed a notice of appeal; the landowners then cross-appealed. By stipulation of all parties, the appeals were withdrawn on October 30, 1978.

On November 17, 1978, the Assistant United States Attorney deposited the full amount of the award with the clerk of the court in satisfaction of the judgment. Ten days later, the government deposited an additional $239,802.90, representing interest at the rate of 6% on the judgment for the year between the entry of final judgment and the payment of that judgment. Distribution of the additional deposit was made subject to a further order of the court. On March 5, 1979, the United States filed

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[1] The Act of Oct. 27, 1972, Pub. L. No. 92-589, 86 Stat. 1299, 16 U.S.C. 460bb *et seq.*, established the Golden Gate National Recreation Area and authorized acquisition of lands within its boundaries by the Secretary of the Interior.

a motion for an order to disallow interest on the judgment.

3. On June 21, 1979, the district court granted the government's motion and issued an order disallowing interest on the judgment (App. C, *infra*, 15a-17a). Relying on the established principle that "interest is allowable only from the time of the 'taking' to the date of the payment of the award," see, e.g., *Danforth* v. *United States*, 308 U.S. 271 (1939), the court found that the United States had not exercised "control and dominion" over the land prior to payment of the judgment (App. C, *infra*, 17a). In its order denying the landowners' motion for reconsideration, the court found no support in the record for the landowners' claim that "the land had increased in value during the time that elapsed from the entry [of verdict] until the Government's taking" (App. D, *infra*, 19a).

4. The United States Court of Appeals for the Ninth Circuit reversed, Judge Wallace dissenting. The court held that interest running from the judgment date should be allowed. Recognizing that "[w]here the property is income-producing, the condemnation judgment is not a taking" (App. A, *infra*, 7a), the court distinguished this situation, where the land was undeveloped, and hence producing no current economic benefits for the owners. In that situation, the court reasoned, the existence of the judgment in condemnation produced a "cloud on the title" that precluded the development or sale of the land, and thus "denied the landowners any economically viable use of their land" (App. A, *infra*, 8a). Accordingly, the panel majority concluded that the date of taking of undeveloped land is the date of judgment, mandating the award of post-judgment interest (*ibid.*).

Judge Wallace dissented, relying on "the long-standing rule that absent a taking by physical possession or by statutory provision, no taking occurs until payment of the condemnation award." App. A, *infra*, 9a. He could see no reason for drawing a constitutional distinction between the owner of unimproved and improved property in these circumstances; both are in the same situation as owners whose ability to sell or develop their land is thwarted by publicly announced government plans to condemn property (App. A, *infra*, 11a). All alike suffer economic burdens that are significantly less than "the kinds of substantial deprivations which have heretofore been recognized as constitutional 'takings'" (App. A, *infra*, 11a-12a). Judge Wallace concluded that any change in the rules applicable to unimproved property should "come from Congress rather than the federal courts" (App. A, *infra*, 12a).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring[2] question concerning the government's obligation to

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[2] The courts that have recently considered the issue have selected various points in the straight condemnation process for the beginning of the accrual of interest. The issue is currently pending in the Court of Appeals for the Fifth Circuit. *United States* v. *2,175.86 Acres of Land in Hardin and Jefferson Counties, Texas, & Kirby Forest Industries*, 5th Circuit No. 81-2402. The district court in *Kirby Forest Industries*, 520 F. Supp. 75 (E.D. Tex. 1981), awarded interest from the date the complaint was filed, some seven months before trial. See also *United States* v. *59.29 Acres of Land in Hardin County, Texas*, 495 F. Supp. 212 (E.D. Tex. 1980) (interest due from the date of the filing of the report and findings of the Commission appointed pursuant to Fed. R. Civ. P. 71A to determine just compensation); *United States* v. *Cer-*

pay interest in straight condemnation cases. The court of appeals' resolution of that question is inconsistent with this Court's decision in *Danforth* v. *United States*, 308 U.S. 271 (1939), and its more recent just compensation cases. In addition, it will be difficult for condemnation courts to apply, and will substantially increase condemnation costs while unfairly discriminating between owners of developed and undeveloped land. A landowner suffering injustices as a result of delays in the payment of a straight condemnation award has alternative remedies free from these disadvantages.

1. Although the potential financial impact on the government of the decision below cannot be predicted with any accuracy, it is bound to be large. As of September 1982, pending cases filed under 40 U.S.C. 257 involve more than 6,000 tracts of land, valued by the government at more than $100 million. The landowners' valuations are, of course, much higher. Most of these condemnations are for the use of the Park Service, and thus presumably involve unimproved land. Assuming that only half of the land involved is determined to be non-income producing, and that there is on the average only 6 months of interest awarded and only at 6% straight interest, the total extra interest obligation under the analysis of the court below would still be about one and a half million dollars for currently pending cases alone. The

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tain Lands in Eastham, Truro, and Wellfleet, County of Barnstable, Commonwealth of Massachusetts, Nos. 68-208C *et al.* (D. Mass. May 28, 1982) (same); *United States* v. *15.65 Acres of Land in the County of Marin, State of California*, Nos. 81-4062 & 81-4101 (9th Cir. May 25, 1982, rehearing denied, Sept. 10, 1982) (interest due from stipulated date of valuation, more than a year before trial).

actual figure would doubtless be substantially in excess of that estimate.

Congressional appropriations to finance these condemnations have been based on the long-standing assumption, recognized by the dissent below (App. A, *infra*, 9a), that in straight condemnation cases where the government has not entered into possession, the date of taking is the date that the government pays the condemnation award,[3] so that no interest is due. In carving out an exception to this general rule for non-income producing land, the court below imposed an unanticipated increase in the cost of acquiring such land, thereby reducing the agencies' abilities to implement congressional directives.

2. In *Danforth* v. *United States*, *supra*, 308 U.S. at 284, this Court concluded that "[u]nless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view that the taking in a condemnation suit * * * takes place upon the payment of the money award by the condemnor. No interest is due upon the award." (Footnote omitted). In concluding that there has "in actuality" been a previous taking when unimproved lands are involved,[4] the court below overlooked the

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[3] Cf. S. Rep. No. 1597, 90th Cong., 2d Sess. 5 (1968), directing the Park Service to utilize straight condemnation proceedings to preserve the option to reconsider, after judgment award fixes cost of acquisition. The option is important: "[t]he cost of public projects is a relevant element * * *, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost," *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 554 (1946).

[4] If the government were to enter into possession of the land before the payment of just compensation, that would effectuate a taking "in actuality", which would require that

analysis upon which the *Danforth* conclusion was based:

> The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. (Footnotes omitted.) *Ibid.*

The argument adopted by the court below that the land was taken when the condemnation judgment denied the landowners "any economically viable use" of their property (App. A, *infra*, 6a) is the same as the claim of the *Danforth* landowner that the government "took" a flowage easement in his farmland[5] either when Congress passed the Flood Control Act that authorized the condemnation or when the government built levees as part of the project, because these actions had, as a practical matter, reduced his ability to use or sell his land. This Court rejected that claim, holding that this reduction in the value of the land, like other changes in value that are incidents of ownership, "cannot be considered as a 'taking' in the constitutional sense" (308 U.S. at 285). There is no suggestion that the size of the change in

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interest be paid to compensate the landowner for the delay in payment. *United States* v. *Dow*, 357 U.S. 17, 24 (1958). In the instant case, however, the district court specifically found that the government had not exercised control and dominion over the land until after it deposited the amount of the verdict in the registry of the court (App. C, *infra*, 17a).

[5] See Brief for William H. Danforth, Petitioner, No. 309, 1959 Term at 4.

value, or a complete inability to sell the land, would have affected the Court's reasoning.[6]

This Court has recently reiterated the teaching of *Danforth*, in again rejecting the claim that the pendency of condemnation proceedings constitutes a constitutional taking of property. *Agins* v. *City of Tiburon*, 447 U.S. 255, 263 n.9. ("Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, * * * cannot be considered as a 'taking' in the constitutional sense"). Cf. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (no taking where statute forbids sale of property).

3. The court of appeals' distinction between "vacant, unimproved land" and income-producing land (App. A, *infra*, 6a-7a) does not withstand analysis. First, vacant, unimproved land may be income producing, for instance if it is used for grazing or timbering (See, e.g., *Kirby Forest Industries*, *supra*, where the district court, using an analysis like that of the court below, concluded that a timber lot was unimproved, and thus not income producing). And, of course, improved land may be difficult, or even impossible, to rent or to use at a profit for all or part of the time the condemnation suit is pending. It is not clear how the court of appeals would treat such situations.[7] Perhaps more seriously, the distinc-

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[6] Indeed, the Court quoted (308 U.S. at 285, n.20) the reference in *Brown* v. *United States*, 263 U.S. 78, 85-86 (1923) to "the presumption * * * that the valuation included the practical damage arising from the *inability* to sell or lease after the blight of the summons to condemn [emphasis added]."

[7] The same classification problem arises if the land is largely unproductive, but has a few improvements that do produce

tion assumes that unimproved land is necessarily held for speculative purposes, while improved land is not. But improved land may well be held with the intention of upgrading its use, and unimproved land may be held without any intention of deriving any present economic benefit from it. As the dissent below recognized (App. A, *infra*, 9a-12a), there is no reason why only the speculative interests of unimproved landowners merit protection.[8]

The difficulty is not resolved by requiring the court to evaluate the particular motivations of all owners of condemned land, whether income producing or not. A major advantage of the fair market value standard of valuation is to avoid requiring the condemnation court to consider such particular values of the individual tract to the landowner. See, e.g., 1 L. Orgel, *Valuation Under the Law of Eminent Domain*, §§ 14, 74-76 (2d ed. 1953).

4. Fairness does not require the award of interest to the landowner who remains in possession for the period between the entry of judgment and the vesting of title on the payment of that judgment. In *Dan-*

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some income. See, e.g., *United States* v. *Holden*, 268 F. Cas. 223, 224 (N.D.N.Y. 1920) (large tract of land; "for the most part it is a swamp and unproductive", but contains two buildings rented for $25 a month).

[8] Indeed, to the extent that interest is designed to compensate the landowner for the loss of the use of the property between the date of the taking and the payment of the award, the owner of non-productive land—who had no current income from the land before the taking, and thus lost nothing that he previously enjoyed—has a less worthy claim to interest than an owner of income producing property whose ability to continue to gain a return on his land is diminished by the pendency of the proceeding. Cf. *United States* v. *Holden*, *supra*, 268 F. Cas. at 224.

forth, supra, this Court recognized the justice of permitting the government a reasonable time to decide whether to acquire the property, once its cost has been established. See also *Tiburon, supra*, 447 U.S. at 263, n.9.[9] If that decision is unreasonably delayed, the landowner may move for dismissal pursuant to Fed. R. Civ. P. 71A(i)(3). In the absence of such a motion, it is reasonable to assume that the landowner does not object to the delay in the payment of the judgment, because he prefers to retain possession of his land, for economic or non-economic reasons.

If the landowner does move for dismissal, he is free at the hearing on the motion to present adequate evidence of any increase in value of the property in the interim in order to demonstrate the inequity of permitting the government to recover on the stale judgment. Cf. *United States* v. *Clarke*, 445 U.S. 253, 258 (1980).

Where, as here, no such evidence has been presented by the landowner[10] the district court correctly refused to assume that the land had increased in value (App. D, *infra*, 16a-17a).[11] Accord, *Gould* v. *United States*, 301 F.2d 557, 560 (D.C. Cir. 1962). In this situation, it is surely reasonable to treat the

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[9] If the government abandons the proceedings, it generally becomes liable to pay the condemnee reasonable attorneys' fees and other litigation expenses. (42 U.S.C. 4654(a)(2)).

[10] The landowner bears the burden of proving the value of the land. *United States ex rel. TVA* v. *Powelson*, 319 U.S. 266, 273 (1943).

[11] Indeed, as the district court noted (App. C, *infra*, 17a), the record evidence indicating "the uniqueness of this land and the particular problems that its development would entail" made reliance on any general escalation in real estate prices particularly inappropriate here.

condemnation transaction like the usual commercial transaction—when payment is received at the time that title and possession of the goods are transferred, no interest is due.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1982

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-4547

DC No. C76 1441ACW

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

156.81 ACRES OF LAND, more or less, situate in the County of Marin, State of California, FRANK W. LYNCH, ELLENORA C. LYNCH, EDWARD R. FITZSIMMONS, ELIZABETH S. FITZSIMMONS, KARL MELCHERS, KARL W. MELCHERS, KAREN MELCHERS STACKHOUSE, HELENE GOODE STACKHOUSE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Northern District of California
Albert C. Wollenberg, District Judge, Presiding

Argued and submitted May 13, 1981

[Filed Mar. 12, 1982]

Before: WALLACE and SKOPIL, Circuit Judges, and KENYON,* District Judge

OPINION

SKOPIL, Circuit Judge:

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* David V. Kenyon, United States District Judge for the Central District of California, sitting by designation.

FACTS AND PROCEEDINGS BELOW

Appellants owned roughly 156.81 acres of undeveloped land in Marin County, California. They had purchased the property for its development potential. It was not income-producing. In July 1976 the United States filed a complaint in condemnation against the land and appellants. The government sought the property for the Golden Gate National Recreation Area. It did not enter into possession nor file a declaration of taking. The complaint sought condemnation of the property and ascertainment and award of just compensation.

In July 1977 the jury valued the land, as of June 1977, at $3,799,400. In November 1977 the district court entered judgment on the verdict. The judgment decreed title to the property vested in the United States upon deposit of the amount of the verdict.

The government moved for a new trial. The motion was denied in June 1978. In August 1978 the parties appealed and cross-appealed. In November 1978 the appeals were dismissed by stipulation. The government then deposited $3,799,400 with the clerk of the district court. The government subsequently deposited an additional $239,802.90 with the court, representing six percent simple interest on $3,799,400 from the entry to the payment of judgment.

In March 1979 the government moved to disallow interest on the judgment. It argued that no interest was due since the government had not taken possession of the property before it paid the judgment. In June 1979 the district court granted the motion over appellants' objection and denied appellants' motion for reconsideration. This appeal followed.

DISCUSSION

Appellants argue that they are entitled to interest on the judgment from the date of valuation to the date of payment. They note that they have remained liable for all expenses relating to the land during that period, but have received no income from it and have been prevented from developing it.

In general, "interest is allowable from the time of the taking and is not allowable for any period prior to the taking." *United States v. Johns*, 146 F.2d 92, 93 (9th Cir. 1944) (footnote omitted). In condemnation proceedings, "the taking generally occurs sometime during the course of the proceeding". *United States v. Clarke*, 445 U.S. 253, 258 (1980). *See also Fulcher v. United States*, 632 F.2d 278, 291 (4th Cir. 1980) (en banc, Phillips, J. concurring). We must decide when, on these facts, the government "took" the appellants' land.

The Supreme Court has stated:

> "Unless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view that the taking in a condemnation suit under this statute [the Flood Control Act of 1928, 33 U.S.C. §§ 702a-702m] takes place upon the payment of the money award by the condemnor. No interest is due upon the award. Until taking, the condemnor may discontinue or abandon his effort. The determination of the award is an offer subject to acceptance by the condemnor and thus gives the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his re-

> sources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. 'The owner is protected by the rule that title does not pass until compensation has been ascertained and paid.' "

Danforth v. United States, 308 U.S. 271, 284-85 (1939) (footnotes omitted).

Danforth construed 33 U.S.C. § 702a. 308 U.S. at 282. In this case, the government has proceeded under the general condemnation statute, 40 U.S.C. § 257. Section 702d contains no substantive rules governing condemnation cases. In construing that statute, the Court must have relied on general rules for condemnation proceedings.

Danforth expressly excepted cases where a taking has occurred in fact before the condemnor pays the landowner. The Supreme Court has refused to adopt any hard and fast rule determining when a taking occurs. There is no *per se* rule that no taking occurs until money changes hands or title passes. *United States v. Dow*, 357 U.S. 17, 22 (1958).

In *Dow*, the Court held that a taking occurred when the government took physical possession of property, even though that event preceded passage of title. *Id.* The Court noted that a contrary rule would absolve the government of the duty to pay interest until title passed, even though it already had possession. *Id.* at 24. Such a rule would permit the government to wait and acquire title at a time when market conditions were favorable. The Court rejected a rule producing "such obvious incongruities and undesirable possibilities," *Id.* at 25. *See also United States v. 42,978 Square Feet of Land*, 445 F.2d 1180, 1188 (9th Cir. 1971); *Fibreboard Paper Products Corp. v. United States*, 355 F.2d 752, 754-55 (9th Cir. 1966).

Eminent domain proceedings are different from inverse condemnation actions. *United States v. Clarke*, *supra*, 445 U.S. at 255. They are not, however, distinct for all purposes. *Fulcher v. United States*, *supra*, 632 F.2d at 284. Inverse condemnation principles determine when "[g]overnment regulation [is] so onerous as to constitute a taking." *American Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 368 (9th Cir. 1981) (quoting *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)). *See also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). These principles are useful in determining when government action pursuant to the eminent domain power constitutes a taking. *See San Diego Gas & Electric Co. v. City of San Diego*, 67 L.Ed.2d 551, 573 (1981) (Brennan, J. dissenting.)

The Court has stated: "Although no precise rule determines when property has been taken, *see Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), the question necessarily requires a weighing of private and public interests." *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980). General equitable principles are relevant to the determination of when a taking occurs. *United States v. Fuller*, 409 U.S. 488, 490 (1973). *Accord, United States v. 320.0 Acres of Land*, 605 F.2d 762, 780 (5th Cir. 1979). *See also United States v. 2,175.86 Acres of Land*, 520 F.Supp. 75, 79-80 (E.D. Tex. 1981).

Just compensation under the fifth amendment means the market value of the property at the time of the taking. *United States v. Reynolds*, 397 U.S. 14, 16-17 (1970). *See also United States v. 429.59 Acres of Land*, 612 F.2d 459, 462, 464-65 (9th Cir. 1980). Where taking precedes payment, the con-

demnor must compensate the landowner for the loss of use of either the property or money between the taking and payment. *United States v. 429.59 Acres of Land*, *supra*, 612 F.2d at 464-65. Interest is a substitute for the cumbersome process of computing appreciation of the property during that period. *Fibreboard Paper Products Corp. v. United States*, *supra*, 355 F.2d at 754 (quoting *Seaboard Air Line Railway v. United States*, 261 U.S. 299, 304-06 (1923)).

The great advantage to the government of proceeding under 40 U.S.C. § 257 is that it can obtain a judicial valuation of the property without committing itself to condemn it. *United States v. Danforth*, *supra*, 308 U.S. at 284. *See also United States v. 341.45 Acres of Land*, 633 F.2d 108, 113 (8th Cir. 1980), *cert. denied*, 68 L.Ed.2d 324 (1981). This flexibility must be harmonized with the just compensation requirement.

In cases like this one involving vacant, unimproved land, a condemnation judgment forces the landowner to hold property which generates liabilities but no benefits, perhaps excepting recreational benefits not present here. Absent recreational benefits, the judgment effectively takes the condemnee's land by denying any economically viable use. No one would buy land which the government could take at an already settled price. No landowner would build on land which the government could take for the price of the land before it had been improved. *State v. Nordstrom*, 54 N.J. 50, 253 A.2d 163, 166 (1969), *quoted in Stewart & Grindle, Inc. v. State*, 524 P.2d 1242, 1247 (Alaska 1974). *See also Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330-31 (9th Cir. 1977); *Thomas W. Garland, Inc. v. City*

of St. Louis, 596 F.2d 784, 787 (8th Cir.), *cert denied*, 444 U.S. 899 (1979). Where the property is income-producing, the condemnation judgment is not a taking, because it does not render the property economically nonviable. *See United States v. Mahowald*, 209 F.2d 751, 754 (8th Cir. 1954).

A condemnation judgment also informs the government how much the property will cost. The government can prevent accrual of interest by depositing the amount of the judgment into court. After judgment, the government cannot dismiss the action without leave of the court. Fed.R.Civ.P. 71A(i)(3). Thus, the possibility that the government may take the condemnee's property has become a definitely asserted purpose and steps have been taken to carry out that purpose. This has been held to constitute a taking. *Gerlach Livestock Co. v. United States*, 76 F.Supp. 87, 97 (Ct. Cl. 1948), *aff'd*, 339 U.S. 725 (1950). *Accord*, *United States v. 2,175.86 Acres of Land*, *supra*, 520 F.Supp. at 79; *United States v. 97.19 Acres*, 511 F.Supp 565, 567 (D. Md. 1981); *United States v. 59.29 Acres of Land*, 495 F.Supp. 212, 215 (E.D. Tex. 1980). Making the date of judgment the date of taking in this situation encourages the government to act promptly once a judgment is issued, since interest begins to accrue at that time. *Brown v. United States*, 263 U.S. 78, 86 (1923). *See also Stewart & Grindle, Inc. v. State*, *supra*, 524 P.2d at 1248; *Orono-Veazie Water District v. Penobscot County Water Co.*, 348 A.2d 249, 258-59 (Me. 1975); *State v. Nordstrom*, *supra*, 253 A.2d at 167; Cal. Civ. Proc. Code § 1249; Uniform Eminent Domain Code § 1202.

Post-judgment delay is unlike pre-condemnation delay. Absent extraordinary delay, there is no taking

where the landowner's ability to sell property is limited during the pendency of condemnation proceedings, since the landowner is free to sell the property when the proceedings end. *Agins v. Tiburon*, *supra*, 447 U.S. at 263 n.9 (quoting *Danforth*, *supra*, and citing *Thomas W. Garland, Inc.*, *supra*, with approval). *See also Hernandez v. City of Lafayette*, 643 F.2d 1188, 1200-01 (5th Cir. 1981). Pre-condemnation delay permits the condemnor to decide whether it wants to condemn. Post-condemnation delay occurs after the government has been given time to decide, and after it knows the price of the land. Though the proceedings have ended, the landowner is not free to sell or develop until the government acts. The cloud on title created by a judgment permitting a taking at a set price is much greater than that created by the mere possibility that the government may condemn.

Because the condemnation judgment denied the landowners any economically viable use of their land, we hold that the government "took" the land at that date. An award of interest from that date is therefore appropriate. Accordingly, the judgment appealed from is REVERSED and REMANDED.

WALLACE, Circuit Judge, dissenting:

The majority has decided that when the government proceeds under the general condemnation statute, 40 U.S.C. § 257, a distinction must be made, for purposes of determining when a taking occurs, between improved property and unimproved property. In the case of unimproved property, the majority rejects the long-standing rule that absent a taking by physical possession or by statutory provision, no taking occurs until payment of the condemnation award. *Danforth v. United States*, 308 U.S. 271, 284 (1939); *United States v. Johns*, 146 F.2d 92 (9th Cir. 1944); *United States v. Mahowald*, 209 F.2d 751 (8th Cir. 1954). The majority holds that in the case of unimproved property, the entry of the condemnation judgment itself effectively "takes" the owner's property by denying him any practical economic use of his land. The obvious purpose of this new rule is to reduce the financial burden on unimproved property owners which occurs when the government waits a period of time after the entry of a condemnation judgment before deciding whether to proceed with the condemnation. As I see it, the effect of a condemnation judgment on the unimproved property owner is not sufficiently different from that on the improved property owner to justify a departure from the general rule that the taking occurs upon the payment of a condemnation award. Therefore, I respectfully dissent.

The majority assumes that the unimproved property owner is necessarily in a far worse position than the improved property owner upon the entry of a condemnation judgment. There are, of course, some differences but they appear to me to be differences in degree, not in kind, and not of the magnitude to require the distinction. For example, after the condemnation

judgment is entered, the unimproved property owner cannot, as a practical matter, sell his land or make substantial improvements upon it. *Ante at* ——. However, the condemnation judgment has exactly the same effect upon the owner of improved property; the fact that property is income-producing or has improvements upon it which can be utilized by the owner does not change the fact that when the government can take the property at an already settled price, there is little incentive to make improvements and little hope of finding an interested buyer. Thus, the only difference can be that during the period of time in which the government decides whether to finalize the condemnation of the property, the improved property may be contributing to costs if it is income-producing, or may be used by the owner in some way. Aside from possible recreational use, or some other use of the land that does not require capital expenditures which would be lost upon condemnation, the unimproved property owner is forced to carry the property's liabilities until the government decides what action it will take.

In deciding whether such a difference is great enough to rise to the level of a constitutional taking, however, it must be emphasized that this is exactly the same position that the unimproved property owner was in prior to the entry of the condemnation judgment. The unimproved property owner cannot claim that the government's actions have permanently removed the opportunity to sell or develop the property. If he holds the land for investment, his return may be delayed. If he plans to improve during the time of delay, there will be an interference. However, as to delay of sale, the improved property owner is similarly delayed, and it is mere speculation to assume

that his present return on investment or the imputed return from the use of the property adequately compensates him for this delay. As to temporary interference with the owner's ability to develop his property, the improved property owner may suffer a similar deprivation if there are plans to develop further the property which must now be held up until the government makes its decision.

Thus, close examination of the effects of the condemnation judgment on the two types of property demonstrates no real certainty that there is any practical economic result which is substantially different. Neither type of property is made permanently nonsalable or nondevelopable. Both types of landowners are forced to postpone whatever development plans may exist. If the government ultimately condemns the property, both owners have "lost" the income or return which could have been earned from investing the condemnation award. The reason that the unimproved property owner, unlike the improved property owner, cannot offset any losses caused by the government's delay is that, prior to the condemnation judgment, it had obviously not been economically feasible to make similar improvements upon the land. Just as the Supreme Court has held that, absent extraordinary delay, "[m]ere fluctuations in value" resulting from precondemnation activities constitute "incidents of ownership" and "cannot be considered as a 'taking' in the constitutional sense," *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980), any increased burden on the unimproved property owner caused by postcondemnation delay is best viewed simply as one of the incidents of ownership of unimproved property. This temporary and partial interference is fundamentally different from the kinds of substantial deprivations

which have heretofore been recognized as constitutional "takings." *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977). If relief is to be provided for unimproved property owners, therefore, it must come from Congress rather than the federal courts. I would affirm the judgment of the district court and deny the award of interest from the date of judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-4547

DC No. C76 1441ACW

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

156.81 ACRES OF LAND, more or less, situate in the County of Marin, State of California, FRANK W. LYNCH, ELLENORA C. LYNCH, EDWARD R. FITZSIMMONS, ELIZABETH S. FITZSIMMONS, KARL MELCHERS, KARL W. MELCHERS, KAREN MELCHERS STACKHOUSE, HELENE GOODE STACKHOUSE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Northern District of California
Albert C. Wollenberg, District Judge, Presiding

[Filed June 1, 1982]

Before: WALLACE and SKOPIL, Circuit Judges; and KENYON,* District Judge

ORDER

The panel has voted to deny the petition for rehearing. Judges Skopil and Kenyon voted to deny a panel

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* David V. Kenyon, United States District Judge for the Central District of California, sitting by designation.

rehearing. Judge Wallace would grant a panel rehearing.

The full court has been advised of the suggestion for rehearing en banc. No judge in active service request a vote on the petition for rehearing en banc.

Accordingly, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C-76-1441 ACW

UNITED STATES OF AMERICA, PLAINTIFF

vs.

156.81 ACRES OF LAND, more or less, situate in the County of Marin, State of California; FRANK W. LYNCH, ET AL., DEFENDANTS

ORDER DISALLOWING INTEREST ON JUDGMENT

The Court entered final judgment in this condemnation case on November 14, 1977. Approximately one year later, on November 17, 1978, the Government deposited in the registry of the Court the sum of $3,799,400, the amount of the verdict and the final judgment. Ten days later, the Government also deposited an additional $239,802.90 as interest on the judgment for the time running from entry of final judgment to its payment; the distribution of this sum was subject to a further order of the Court. The Government now requests the Court to issue an order disallowing interest on the judgment. The Court grants that motion.

A condemnee is entitled to payment of just compensation. The general rule covering the payment of interest in condemnation cases holds that interest is

allowable only from the time of the "taking" to the date of the payment of the award. *See Danforth v. United States*, 308 U.S. 271, 284 (1939); *Gould v. United States*, 301 F.2d 557, 559 (D.C. Cir. 1962); *United States v. Johns*, 146 F.2d 92, 93 (9th Cir. 1944). This authority clearly forecloses defendants from advancing their specious argument that the Government must pay interest on a condemnation judgment, as if it were an ordinary litigant.*

At oral argument, defendants raised a second point that commands more serious attention. Defendants argued that a fifteen-month delay in the payment of a verdict in a condemnation case deprives an owner of just compensation because the present escalating spiral in real estate prices has led to an inequitable disparity between the fair market value at the time of the award and the payment. An interest payment covering that period would compensate the owner for this disparity. As authority for this argument, defendants referred to the last paragraph of *Gould*, 301 F.2d at 559-60. That court neither embraced this approach nor rejected it out of hand; rather, the court held that the record failed to reflect that the land value had increased.

Defendants' argument has some validity. At least it is consistent with the often repeated principle that: "Just compensation is the value at the time of the taking." *See, e.g., Danforth*, 308 U.S. at 283. Just as in *Gould*, however, defendants have failed to supplement the record with any concrete evidence attesting

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* Both cases that defendants cite in support of their motion involve payment of interest *from the time of the taking*. *See* Stowers v. United States, 191 F. Supp. 795 (N.D. Ga. 1961); United States v. Savannah Shipyards, Inc., 139 F.2d 953 (5th Cir. 1944).

to the land's increase in value. Defendant FitzSimmons' self-serving affidavit does not suffice to make this showing. Testimony at the trial indicated the uniqueness of this land and the particular problems that its development would entail. Given this factual record from which it cannot be assumed that the land value has increased, the Court declines to fashion an exception to the no-interest-before-a-taking rule.

Defendants also raise the factual argument that the taking occurred upon the entry of final judgment because since that time the Government has exercised control and dominion over the land. The parties have submitted conflicting affidavits on this question. The Court finds that the Government did not exercise such control until after it deposited the amount of the verdict in the registry of the Court. Therefore, no interest was due for the time preceding that act.

ACCORDINGLY, IT IS HEREBY ORDERED that the Clerk of the Court issue to the National Park Service a check representing the amount of $239,802.90, plus any interest accrued thereon since the date of its deposit.

DATED: June 21, 1979.

/s/ Albert C. Wollenberg
ALBERT C. WOLLENBERG
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

C-76-1441 ACW

UNITED STATES OF AMERICA, PLAINTIFF

vs.

156.81 ACRES OF LAND, more or less, situate in the County of Marin, State of California, ET AL., DEFENDANTS

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

The motion of the defendants for reconsideration of the order of June 21, 1979, disallowing interest, having come on for a hearing on August 24, 1979, based upon the pleadings, records, briefs, the arguments of counsel, and the declarations and exhibits on file herein, the Court having found that defendants' motion was timely served.

IT IS HEREBY ORDERED that defendants' motion for reconsideration of the order of June 21, 1979, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, is DENIED.

For purposes of clarification, the Court makes the following comments about its previous order. Contrary to defendants' contentions, the Court did not embrace an exception to the long-established rule holding that interest is allowable in condemnation cases only from time of the taking to the date of the payment of the award. *See Gould v. United States*, 301 F.2d 557, 559 (D.C. Cir. 1962); *United States v.*

Johns, 146 F.2d 92, 93 (9th Cir. 1944). Rather, the Court intended to indicate that the case law precluded recognition of the proffered exception and, that, in any event, the factual record did not support defendants' arguments underlying its proposed exception that the land had increased in value during the time that elapsed from the entry of verdict until the Government's taking. The Court also notes that defendants' affidavits in support of their position that the Government had exercised control and dominion over the land from the time of the verdict did not provide any significant evidence on this question. Thus, the Court felt that an evidentiary hearing on this issue was unnecessary.

DATED: September 11, 1979.

/s/ Albert C. Wollenberg
ALBERT C. WOLLENBERG
United States District Judge

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No. 82-552

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

156.81 ACRES OF LAND, MORE OR LESS, SITUATE IN COUNTY OF MARIN, STATE OF CALIFORNIA, ET AL.

Response to Petition For a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

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QUESTION PRESENTED*

Whether the Fifth Amendment requirement of just compensation compels the payment of interest on a condemnation award for the delay between the entry of judgment and the date of payment when the land being condemned does not produce any income, the landowners have been deprived of any viable economic use of the property since the entry of judgment, and the landowners remain liable for the expenses of the property for the period of delay in payment?

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*The Respondents in this appeal are Edward M. Walsh, Trustee for the Chapter 11 estate of Edward R. Fitzsimmons, Elenora C. Lynch, individually and as Executrix of the Estate of Frank W. Lynch, Elizabeth S. Fitzsimmons, Karl Melchers, Karen W. Melchers Stackhouse and Helene Goode Stackhouse.

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IN THE

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UNITED STATES OF AMERICA, PETITIONER

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156.81 ACRES OF LAND, MORE OR LESS, SITUATE IN COUNTY OF MARIN, STATE OF CALIFORNIA, ET AL.

Response to Petition For a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

REASONS FOR DENYING THE PETITION

This case involves the just compensation payable to landowners of non-income producing property in a condemnation action. The precise issue is whether the landowners are entitled to compensation for the government's delay in payment subsequent to the entry of judgment. It is the Respondents' position that without payment for this delay the Fifth Amendment's requirement of just compensation is not fulfilled because, during the period of delay, the landowners have been deprived of any viable economic use of their property while remaining liable for all of the prop-

erty's expenses. The Ninth Circuit found that under these circumstances a taking occurs when the judgment is entered and the government must pay interest from the date of taking to the date of payment.

1. The Reasons for Granting the Petition begin with the statement that this case presents an important and recurring question concerning the government's obligation to pay interest. This statement is supported by a footnote citing four cases. In each of those four cases the Courts have held that interest is payable to a landowner of non-income producing property for a period of time prior to possession and payment by the government. *United States v. 15.65 Acres of Land in the County of Marin, State of California* (9th Cir., May 25, 1982, rehearing denied, September 10, 1982), a copy of the as yet unpublished opinion is reprinted as Appendix A hereto, *United States v. 2,175.86 Acres of Land in Hardin and Jefferson Counties, Texas, & Kirby Forest Industries,* 520 F.Supp. 75 (E.D. Tex. 1981), *United States v. 59.29 Acres of Land in Hardin County, Texas,* 495 F.Supp. 212 (E.D. Tex. 1980), *United States v. Certain Lands in Eastham, Truro, and Wellfleet, County of Barnstable, Comomnwealth of Massachusetts* (D. Mass. 1982), the decision in this last case is unreported so a copy of the decision is reprinted as Appendix B hereto.

State courts that have encountered this same question have reached the same result: the constitutional mandate of just compensation requires the payment of interest to the owners of non-income producing land to compensate them for the delay between valuation and payment. *State v. Nordstrom,* 253 A.2d 163, 54 N.J. 50 (1969), *Stewart & Grindle, Inc. v. State,* 524 P.2d 1242 (Alaska Supreme Court, 1974), *Lazy Mountain Aviation v. City of Palmer,* 618 P.2d 570 (Alaska Supreme Court, 1980).

One of the important factors in this Court's decision to grant a petition for certiorari is the existence of conflicting rules among the lower courts. In the present case there is no conflict among the lower courts. Every court that has squarely addressed the issue as to whether an owner of non-income producing property is entitled to interest for the post-judgment delay in payment by the government has held that the constitutional requirement of just compensation compels the award of interest. The consistency of the holdings in these various cases by these many courts may make the holdings important and recurring to the government, but it does not necessarily follow that this Court should take the time to hear and rule upon an issue that is being consistently determined by the lower courts.

For this reason alone, the petition for certiorari should be denied.

2. The government argues as a reason for granting the petition that the rule expressed in these cases will impose an unanticipated increase in the government's cost of acquiring property. The rule expressed by this case, and the other similar cases, is that the landowners are not paid the just compensation required by the Fifth Amendment of the United States Constitution unless interest for post-judgment delay is included. The government's position is that a rule developed to insure the constitutionally-required payment of just compensation should be reviewed and altered by this Court because it will impose a financial burden on the government. This Court, however, is not the guardian of the Treasury.

Judgment was entered in this case on November 9, 1977. The amount of the judgment was not deposited with the clerk of the court until one year later, on November 17, 1978. Ten days later the government deposited an additional

$239,802.90, representing interest at 6% on the judgment for the one year period. The interest was later permitted to be withdrawn. The facts of the case therefore demonstrate that the government voluntarily delayed the payment and budgeted for the payment of interest. If the government in this case desired to prevent the running of interest, it could have deposited the amount of the judgment when the judgment was entered.

The increase in costs to the government necessitated by an interpretation of the requirements of the Fifth Amendment is not a compelling reason for this Court to review the ruling of the Ninth Circuit. If the government cannot afford to pay just compensation for property it is seeking to condemn, it should not acquire the property.

3. The government argues that this case should be granted certiorari because it is inconsistent with this Court's ruling in *Danforth v. United States,* 308 U.S. 271 (1939). Their argument is in error. The opinion of the Ninth Circuit specifically sets forth its consistency with the *Danforth* opinion. As pointed out in the Ninth Circuit's opinion, *Danforth* expressly does not apply to situations where "a taking has occurred previously in actuality." (*Danforth v. United States, supra,* 308 U.S. at 284 and cited and discussed in the Ninth Circuit's opinion in this case at Petitioner's App. A, 3a-4a). The Ninth Circuit in this case expressly found that a taking occurred in actuality, under the present circumstances, at the date of entry of judgment.

This Court has recognized that the determination of when a taking occurs is a very difficult one, and one that is very dependent upon the particular circumstances of each case:

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a

problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960), this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. See *Goldblatt v. Hempstead,* 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962). Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *United States v. Central Eureka Mining* Co., 357 U.S. 155, 168, 78 S.Ct. 1097, 1104, 2 L.Ed.2d 1228 (1958); see *United States v. Caltex, Inc.,* 344 U.S. 149, 156, 73 S.Ct. 200, 203, 97 L.Ed. 157 (1952).

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-banker expectations are, of course, relevant considerations. See *Goldblatt v. Hempstead, supra,* 369 U.S., at 594, 82 S.Ct., at 990. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123-24, 98 S.Ct. 2646, 2659 (1978).

The Ninth Circuit analyzed the facts of this case under these principles. The Ninth Circuit found that the land being condemned was not income producing, that the owners were prevented from developing the land from the entry of

judgment, and that the owners nevertheless remained liable for all expenses relating to the land until payment. The Ninth Circuit found that under these circumstances "the judgment effectively takes the condemnee's land by denying any economically viable use." (See Petitioner's App. A, 6a.) The facts of this case, wherein the entry of judgment was found to have denied the landowners any economically viable use of their property, is therefore materially different from the facts in *Danforth* wherein the landowner's ability to use or sell his land was merely reduced by the government's actions.

The government claims that the Ninth Circuit overlooked the analysis upon which the *Danforth* conclusion was based (i.e. that the condemnation award is an offer, subject to acceptance by the government, that provides it with the opportunity to determine the cost of any piece of property). This conclusion of the *Danforth* case is not inconsistent with the holding of the Ninth Circuit. The Ninth Circuit simply held that compensation is due the landowners for any delay from the entry of judgment because the landowners are deprived of all economic use of their land from that date. If the government decided after six months that it did not wish to purchase the property it could so elect, as long as the landowners were compensated for the six months they were without any use of their property.

The opinion of the Ninth Circuit is therefore consistent with the analysis and conclusions of *Danforth*. If the condemnation judgment is an option, the requirement that the landowners be compensated for the delay in exercising the option is merely the constitutionally-required just compensation for the option. In the present case the government decided to exercise its option and paid the determined value one year later than the recognized date of taking. Interest

from the date of taking to the date of payment is the judicially-accepted procedure for insuring that an owner is paid just compensation as of the date of taking. *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 305 (1923).

Contrary to the government's argument, the analysis of the Ninth Circuit is consistent with and applies the principles of this Court. The petition for a writ of certiorari should therefore be denied.

4. The government argues that the Ninth Circuit's distinction between vacant, unimproved land and income producing land does not withstand analysis because unimproved land can produce income. This argument is a misreading of the Ninth Circuit's opinion. The distinction drawn by the Ninth Circuit is between income producing and non-income producing property. Throughout the opinion reference is made to the critical fact that the Respondents' property did not produce any income. (Petitioner's App. A, 2a, 3a, and 6a)

The analysis of the Ninth Circuit is clearly based upon this distinction between property that produces income and property that does not produce income. For property that does not produce income, any delay in payment after the entry of judgment reduces the actual amount of compensation to the landowners because they have remained liable for the expenses of the property without any off-setting income. The government's argument is therefore a misreading of the Ninth Circuit's opinion that is designed to create doubt as to the validity of its conclusion. The validity of the analysis of the Ninth Circuit in this case is supported by the similar rulings of the Supreme Court of New Jersey (*State v. Nordstrom, supra*), the Supreme Court of Alaska (*Stewart & Grindle, Inc. v. State, supra*, and *Lazy Mountain Aviation v. City of Palmer, supra*), a completely sep-

arate panel of the Ninth Circuit Court of Appeals (*United States v. 15.65 Acres of Land in the County of Marin, State of California, supra*), two different federal district courts in the Eastern District of Texas (*United States v. 2,175.86 Acres of Land in Hardin and Jefferson Counties, Texas, & Kirby Forest Industries, supra*, and *United States v. 59.29 Acres of Land in Hardin County, Texas, supra*), and a federal district court in the District of Massachusetts (*United States v. Certain Lands in Eastham, Truro, and Wellfleet, County of Barnstable, Commonwealth of Massachusetts, supra*).

5. Lastly, and most unpersuasive of all, the government argues that fairness does not require the award of interest to an owner of non-income producing land for the delay between the entry of judgment and the payment. The government concludes its petition by stating:

> it is reasonable to treat the condemnation transaction like the usual commercial transaction—when payment is received at the time that title and possession of the goods are transferred, no interest is due.

If a proper analogy to a commercial transaction is drawn, however, it is evident that the payment of interest is required. In a commercial transaction where the price of merchandise is established and the purchasing party is given the right to purchase at that price in the future, it is called an option. The option is a valuable contractual right to the prospective purchaser. In a normal commercial setting options are never free. Requiring the government to pay interest for the delay between the entry of judgment and payment is just compensation for their option.

How is it fair that the government can pay, on November 17, 1978, the amount determined to be the value of the property as of June, 1977? Even if the property did not

increase in value, a proposition Respondents refute, just compensation has not been paid because the owners have remained liable for all expenses of the property without any off-setting income. Courts must recognize the reality of today's economy. Paying $1.00 tomorrow to discharge a debt of $1.00 due and payable today is paying less than is owed. See *United States v. Blankenship*, 543 F.2d 1272, 1275 (9th Cir. 1976).

The rule that the government should compensate the landowner for the delay in payment is fair to the government because it is the government, and only the government, that can prevent the harm to the landowner by depositing the money with the clerk of the court. Any disadvantage to the government can be alleviated by the government acting promptly. Fairness therefore requires that the landowners be compensated for the delay in payment and for paying all expenses of the property during the period of delay.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submited.

ROBERT A. HUDDLESTON
Attorney for Respondents

November 1982

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 81-4062
No. 81-4101

DC# CV-77-0998-SW

UNITED STATES OF AMERICA,
Plaintiff-Appellant/Cross-Appellee,

vs.

15.65 Acres of Land in the County of Marin, State of California; MARIN RIDGELAND COMPANY, a joint venture comprised of O.D.C. of CALIFORNIA, INC., a corporation; and J. H. SCHEUER, a.k.a. JAMES H. SCHEUR; HOUSING AUTHORITY OF THE COUNTY OF MARIN; REDEVELOPMENT AGENCY OF THE COUNTY OF MARIN; and UNKNOWN OWNERS,
Defendants-Appellees/Cross-Appellants.

OPINION

Appeal from the United States District Court
for the Northern District of California
Spencer Williams, District Judge, Presiding
Argued and Submitted March 9, 1982

Before: CHOY, SNEED, and SCHROEDER, Circuit Judges

SNEED, Circuit Judge:

James H. Scheuer and Marin Ridgeland (both hereafter designated as the Company) owned a 164.03 acre tract, which they were developing for residential use. Their neighbors, Glass and Fitzsimmons also intended to develop

their lands. A condition to the latter developments was the dedication to public use of a road, which would provide southern access to the Company's property (*see* diagram, Appendix A). Optimal development of the Company's land depended upon such access.

In 1977, the government instituted contemporaneous condemnation actions against Glass, Fitzsimmons and the Company to acquire land for the Golden Gate National Recreation Area (G.G.N.R.A.). The condemnation trial for 15.65 acres of the Company's land began on July 28, 1980. The jury awarded $623,196 in "severance damages." In determining this amount, they were permitted, over objection, to consider the effect of both loss of access and a probable change to a much more restrictive zoning classification. The government contends that neither should have been considered. The Company cross-appeals the denial of its motion for post-judgment interest. Our jurisdiction rests on 28 U.S.C. § 1291. We reserve the judgment with respect to severance damages and remand for further proceedings. We also reverse the denial of the Company's motion regarding interest.

I.

SEVERANCE DAMAGES

Unless there is a taking,[1] the government is not required to compensate a landowner even though its actions affect the value of his land. *United States v. Fuller*, 409 U.S. 488, 492 (1973); *Campbell v. United States*, 266 U.S. 368, 371 (1924). When there is a taking, the Fifth Amendment mandates payment of the value of the taken lands. Several rules have been developed for determining the extent to which

1. The parties to this case do not dispute that there has been or will be a taking of some of the Company's property.

to compensate a landowner even though its actions affect

this value includes so-called severance damages. First, severance damages, consisting of a diminution in value of the remainder resulting from the taking and use of the part of the land, are recoverable. *United States v. Miller*, 317 U.S. 369, 376 (1943); *United States v. 91.90 Acres of Land*, 586 F.2d 79, 86 (8th Cir. 1978), *cert. denied*, 441, U.S. 944 (1979). Second, severance damages do not include any diminution in value arising solely from "the acquisition and use of adjoining lands of others for the same undertaking." *Campbell v. United States*, 266 U.S. at 372, *see also United States v. 10.0 Acres of Land*, 533 F.2d 1092, 1097 (9th Cir. 1976) (Carter, J., dissenting); *Gibson & Perin Co. v. Cincinnati*, 480 F.2d 936, 944-45 (6th Cir.), *cert. denied*, 414 U.S. 1068 (1973).

Both rules lead to sensible results. A private seller, upon receiving a bid for a portion of his land and responding thereto in a rational manner, will fix his asking price at an amount that will compensate him for any diminution in value of the remainder of his land. The buyer must pay this price if he wishes to acquire the portion he seeks. On the other hand, a private landowner whose property has its value reduced by the acquisition and use of an adjoining neighbor's land by a third party buyer ordinarily cannot recoup this loss from either the neighbor or the third party buyer. Only the imposition of a duty by operation of law can alter this result. In the absence of such a duty, the third party buyer, having no need for any of the injured landowner's property, will pay him nothing, and the neighbor obviously will not be moved to share voluntarily the proceeds of his sale. Under these circumstances the injured landowner has no remedy. The government in condemnation proceedings is subject to the burdens, as well as the benefits, of these economic realities inasmuch as its liability,

as the Court in *Campbell* explained, is no broader than that of a private party. 266 U.S. at 372.

The application of these rules becomes complex when the injury to the landowner may be said to flow both from the taking and use of but a portion of his property *and* from the use to which the government puts land taken from a third party neighbor. At first blush the problem appears to be merely that of choosing which of the above two rules should apply. Reflection and case authority suggest, however, that a third rule is required. This rule appears in *United States v. Pope & Talbot,* 392 F.2d 822 (9th Cir. 1961), in which payment for reduced accessibility of land *not* taken was permitted when a dam project undertaken by the condemnor government flooded a road which traversed both the government's land and the property taken from the condemnee landowner. In that case we noted the existence of three factors that distinguished it from *Campbell,* the source of the second rule stated above: (1) the land taken from the condemnee landowner was indispensable to the dam project; (2) the land taken constituted a substantial (not inconsequential) part of the tract devoted to the project; and (3) the damages resulting to the land not taken from the use of the land taken were inseparable from those to the same land flowing from the condemnor government's use of its adjoining land in the dam project. 293 F.2d at 825. Thus, three elements, indispensability, substantiality, and inseparability, are necessary to negate the application of *Campbell.*

The necessity of these elements is also quite sensible. The element of indispensability assures that the government is being required to pay no more than a private buyer confronted with the same compulsion. In either event, indispensability affords the landowner the ability to demand

payment for the injury to his remaining property, just as he is able to do so under the first rule stated above. Substantiality tends to assure the existence, in fact, of indispensability, and inseparability tends to assure that the injury to the land not taken does not arise from a use independent of the project with respect to which the property taken was indispensable.

The Company in this case did not attempt to utilize these elements in its efforts to recover for the decline in value of the land retained attributable to the loss of access and down-zoning. Nor was the jury charged in accordance with the teaching of *Pope & Talbot, Inc.* The portion of the charge applicable to severance damages, which is set forth in the margin,[2] is quite general. The operative portion provides:

> "If you find, by a preponderance of the evidence, that there was a reasonable probability that had the Glass and Fitzsimmons property been developed, such access

---

2. This portion of the charge is as follows:

"You are instructed that no consideration shall be given to nor allowance of just compensation made for any elements of value depending upon events or circumstances or combination of occurrences, which, while within the realm of possibility, have not been shown by a preponderance of the evidence by the landowners to be reasonably probable in the reasonably near future after the date of valuation.

For example, the property owners assert the value of the remainder has been diminished by the taking of the Glass and Fitzsimmons properties by virtue of their belief that had such properties developed without intervention of the project, a southerly access to the subject property over the Glass and Fitzsimmons properties would have been available.

If you find, by a preponderance of the evidence, that there was a reasonable probability that had the Glass and Fitzsimmons property been developed, such access would have been available, you may consider the loss thereof in determining the market value of the remainder. If you do not so find, however, you may not consider the unavailability of such southern access in determining the fair market value of the remainder." R.T. 1267

> would have been available, you may consider the loss thereof in determining the market value of the remainder. If you do not so find, however, you may not consider the unavailability of such southern access in determining the fair market value of the remainder."

Under this charge the compensability of the decline in value of the Company's retained 148.38 acres turns exclusively on the "reasonable probability that had the Glass and Fitzsimmons property been developed, such access would have been available."

In no way does this charge link the 15.65 acres taken from the Company with the taking and use of the Glass and Fitzsimmons property. The taking of the 15.65 acres would appear to be an adventitious event that permits, contrary to the rule of *Campbell*, compensation for a decline in value of the retained 148.38 acres resulting *solely* from the taking and use of the Glass and Fitzsimmons properties. In essence, the charge appears based on the principle that a taking and use of my neighbor's land by the government that diminishes the value of my land entitles me, without any further showing, to compensation under the Fifth Amendment. This is not the law.

The required linkage between the Company's 15.65 acres taken by the government and the taking and use of the Glass and Fitzsimmons property consists of the three elements of *Pope & Talbot, Inc.* previously discussed. The jury charge must incorporate not only the reasonable probability that but for the taking of the Glass and Fitzsimmons properties the southern access would have existed, but also the indispensability of the Company's 15.65 acres to government program of acquisition for the G.G.N.R.A., which included the acquisition of the Glass and Fitzsimmons properties, the consequentiality of the Company's tract to this pro-

gram, and the necessity that the decline in value of the retained 148.38 acres be attributable *both* to the taking and use of the 15.65 acres of Company land and the taking and use of the Glass and Fitzsimmons properties.

Notwithstanding the necessity of establishing the *Pope & Talbot, Inc.* linkage when compensation is sought for a decline in value attributable in part to the taking of a neighbor's property, the Company in this case is entitled to compensation for such decline in value in its retained 148.38 acres if it is able to show by a preponderance of the evidence that this decline is *solely* attributable to the taking and use of its 15.65 acres. Obviously any decline attributable to the taking and use of the Glass and Fitzsimmons tracts would not be compensable under this approach. The loss of southern access would not appear to be compensable under this approach;[3] but the state of the record precludes a ready answer with regard to down-zoning.[4] Perhaps the Company can demonstrate that the probability of down-zoning was solely attributable to the taking and use of the 15.65 acres. In any event, on remand it is entitled to try.

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3. This assumes that it is impossible to determine or separate loss access due to the taking of the 15.65 acres and from that resulting from the taking of Glass and Fitzsimmons lands. If damages are separable, the two general rules can be directly applied to each kind of damages. *See* Georgia-Pacific Corp. v. United States, 640 F.2d 328 (Ct. Cl. 1980).

4. There were some indications in the record that it was the special view from the ridge which county officials were seeking to protect.

The government contends on appeal that a zoning change cannot be a proper factor to consider when calculating severance damages. We disagree. A probable zoning change would be considered by a private buyer in determining fair market value of the property, and therefore may be considered in a condemnation proceeding. United States v. 174.12 Acres of Land, No. 80-3433 (9th Cir. Feb. 8, 1982); United States v. 320.0 Acres of Land, 605 F.2d 762, 819 (5th Cir. 1979).

For the reasons set forth above we must reverse the judgment below insofar as it awards severance damages in the amount of $623,196, and remand for further proceedings that are in accord with this portion of our opinion.

II.

THE CROSS-APPEAL: POST JUDGMENT INTEREST

The Company cross-appeals the denial of its motion for post judgment interest.

Although interest is usually not available on a judgment against the United States absent a statute, *DeLucca v. United States,* No. 81-5011 (9th Cir. Mar. 1, 1982), the Fifth Amendment makes interest available when a taking precedes payment. *United States v. 174.12 Acres of Land,* No. 80-3433 (9th Cir. Feb. 8, 1982); *United States v. Johns,* 146 F.2d 92, 93 (9th Cir. 1944). However, condemnees are not entitled to interest before the date of the taking. *Danforth v. United States,* 308 U.S. 271, 286 (1939); *United States v. 156.81 Acres of Land,* No. 79-4547 (9th Cir. Mar. 12, 1982). The issue before us, therefore, is when, if ever, did a taking occur?

The trial court held that the government had not yet taken the land because it had neither filed a declaration of taking nor entered into possession. However, there is no simple formula for establishing when property has been taken. *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979). Rather, deciding when a taking occurs requires an ad hoc inquiry into when " 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978).

The effect of a condemnation suit on unimproved land held for development is significantly different from its effect on developed property. While a condemnation suit may change the value of improved property somewhat, the owner usually continues to enjoy the beneficial use of his land until a declaration of taking is filed. *See Gould v. United States,* 301 F.2d 557, 559 (D.C. Cir. 1962) (no interest where owner received income and retained title and possession). Intervening fluctuations in value are indistinguishable from the usual burdens of ownership and do not constitute a taking. *Agins v. Tiburon,* 447 U.S. 255, 263 n.9 (1980); *Danforth,* 308 U.S. at 285. Therefore, when the government condemns improved or productive property, neither the stipulated date of valuation, *United States v. Mahowald,* 209 F.2d 751, 754 (8th Cir. 1954), nor the date of judgment, *Danforth,* 308 U.S. at 284; *Gould,* 301 F.2d at 560, mark the date of a taking.

On the other hand, when the property condemned is intended for development and sale, and remains unimproved, the owner following a condemnation suit frequently loses more than just value; he may be deprived of all economic use of his land. While the action is pending, the land is almost impossible to sell, although that alone is not sufficient to create a taking. *Agins v. Tiburon,* 447 U.S. 255, 263 n.9 (1980). Also, as was pointed out by the majority in *United States v. 156.81 Acres,* No. 79-4547 (9th Cir. Mar. 12, 1982), no one would improve the property after the date of valuation because the government could acquire it at a pre-improvement price. *Accord State v. Nordstrom,* 54 N.J. 50, 253 A.2d 163, 166 (1969); *Stewart & Grindle, Inc. v. State,* 524 P.2d 1242, 1247 (Alaska 1974). The owner of unimproved land is thus left with the liabilities which follow title but none of the benefits, save the right ultimately to be paid for the taking.

Under these circumstances, we hold it proper to invoke the rule that when the government deprives an owner of all economic use of his land, there has been a taking. *156.81 Acres, supra; see also Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 138 n.36 (1978). In this case a virtual ban on development and sale has been imposed that has rendered impossible any economic use of the 15.65 acres. We therefore hold that the land has been taken.

The next question is when did it occur? Under the somewhat unusual circumstances of this case, we find the stipulated date of valuation to be the date. *156.81 Acres, supra,* in which the date of judgment was held to be the date of the taking, does not compel a different result. In that case, valuation was just one month before trial. The landowners were therefore not burdened for long with the development limitations which, together with the sale restriction, rendered the land useless. In contrast, the parties here valued the land as of a date more than one year before the start of the trial and were without use or compensation for a long period of time. Applying a sense of "justice and fairness," *Penn Central Transportation,* 438 at 124, we hold that the landowners are entitled to interest from May 5, 1979, the date of valuation.

Nor are we barred from reaching this result by the Company's request for interest only from the date of judgment, December 8, 1980. It would be unfair to adhere to that date in view of our reversal of that portion of the judgment pertaining to severance damages. To postpone the date of taking to a time subsequent to the date our mandate becomes effective would be even more unfair. The date we have selected, May 5, 1979, we believe is a just and fair one.

The appropriate rate of interest is an issue of fact. *United States v. 429.59 Acres of Land,* 612 F.2d 459, 464

(9th Cir. 1980); *United States v. Blankinship*, 543 F.2d 1272 (9th Cir. 1976). We therefore remand the case to the district court for a determination of the proper interest rate.

III.

CONCLUSION

We reverse and remand this case to the trial court for a determination of the proper amount of severance damages, if any, and the proper rate of interest. In all other respects the judgment, as modified by this opinion, is affirmed.

REVERSED AND REMANDED IN PART; AFFIRMED AND MODIFIED IN PART.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 68-208-C
TRACT NO. 18T-2925

CIVIL ACTION NO. 72-1423-C
TRACT NOS. 14T-3505
14T-3522
14T-3523

CIVIL ACTION NO. 73-780-C
TRACT NO. 25T-5788

CIVIL ACTION NO. 73-1051-C
TRACT NO. 14T-3467

CIVIL ACTION NO. 73-1278-C
TRACT NO. 19T-5108

CIVIL ACTION NO. 74-216-C
TRACT NO. 16T-2578

CIVIL ACTION NO. 74-1833-C
TRACT NO. 18T-3139

CIVIL ACTION NO. 74-4664-C
TRACT NO. 18T-2964

CIVIL ACTION NO. 73-1837-C
TRACT NOS. 25T-5775
25T-5787
25T-5780

CIVIL ACTION NO. 75-3546-C
TRACT NO. 11T-2239

United States of America,

Plaintiff,

v.

Certain Lands in Eatham, Truro and Wellfleet, County of Barnstable, Commonwealth of Massachusetts, et al,

Defendants.

ORDER

May 28, 1982

CAFFREY, Ch. J.

In each of the above-captioned tracts the issue of ownership of the tract has been resolved by the Court and the valuation of each individual tract has been determined by a trial before the three Commissioners appointed by this Court to value tracts taken by the government for the Cape Cod National Seashore. Subsequent to the filing of the findings of the Commissioner, the United States, for circumstances obviously beyond the control of the United States Attorney for this district or the Assistant United States Attorneys who have been representing the United States in this litigation, has failed to pay the landowners the amount determined by the Commissioners to constitute just compensation for the taking.

The owners of the land taken have now filed motions for the payment of interest on the condemnation awards made for each of the above-referenced tracts. The motion has been opposed by the government and has been briefed and argued by the parties.

It requires no great legal scholarship for a person to realize that the government's power to take private property by eminent domain is subject to the Fifth Amendment to the Constitution of the United States which in turn

requires that there be no taking of property by the sovereign without due process of law. It likewise requires no scholarship to understand that due process of law carries with it the obligation on the sovereign to make payment to the private citizen within a reasonable time after the taking by eminent domain.

In the instant case, the conduct of the Department of Interior in connection with the establishment of the Cape Cod National Seashore has been a classic example of the denial of due process to those persons whose land has been taken. The land has effectively been tied up for Federal Government purposes since Congress in 1961 enacted Public Law 87-126, Sec. 4(d), codified at 16 U.S.C. § 4596-3(d). That statute created the Cape Cod National Seashore, and shortly thereafter *lis pendens* were filed in the Barnstable Registry of Deeds concerning most of the tracts involved. Since that time the landowners have been unable to sell their land or do much of anything with it other than pay municipal taxes thereon.

The Supreme Court of the United States in a number of decisions has ruled that the Fifth Amendment requires the payment of interest to landowners whose land is taken but not promptly compensated for. *See Seaboard Air Line Railway Co. v. United States,* 261 U.S. 299 (1923) and *United States v. Rogers,* 255 U.S. 163 (1921). The validity of those decisions, both filed in the 1920's, has been reaffirmed by the Supreme Court in *United States v. Klamath Indians,* 304 U.S. 119 (1938) and such cases as *Albrecht v. United States,* 329 U.S. 599 (1946).

The validity of the ruling that the government has an obligation to pay interest to the landowner when the government has been tardy in making prompt payment for the taking of private property has been recognized in *United*

States v. 106.64 Acres of Land, 264 F.Supp. 199 (D. Neb. 1967) and more recently in *United States v. 59.29 Acres of Land*, 495 F.Supp. 212 (E.D. Texas 1980).

Accordingly, I rule that the due process clause of the Fifth Amendment requires that the United States pay interest at the rate of 8% to each of the owners of the above-listed tracts from the date of the filing of the Commissioners' report for that particular tract to the date of payment of the judgment in that amount.

Andrew A. Caffrey, Ch. J.

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CLERK

No. 82-352

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

156.81 ACRES OF LAND, MORE OR LESS, SITUATE IN COUNTY OF MARIN, STATE OF CALIFORNIA, ET AL.

MEMORANDUM OPPOSING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-552

UNITED STATES OF AMERICA, PETITIONER

v.

156.81 ACRES OF LAND, MORE OR LESS, SITUATE IN COUNTY OF MARIN, STATE OF CALIFORNIA, ET AL.

MEMORANDUM OPPOSING CERTIORARI

Respondent Karen Melchers Stackhouse submits this memorandum in opposition to the petition of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

This case does not warrant review by this Court:

1. There is no conflict among the decisions of the courts that have recently considered the issue presented by the petition. Each of those courts, in cases which

involved the condemnation of unimproved land, awarded the landowners interest on the condemnation award from the approximate date of taking, as determined by the court, to the date of payment. United States v. 15.65 Acres of Land in the County of Marin, State of California, Nos. 81-4062 & 81-4101 (9th Cir. May 25, 1982, rehearing denied, Sept. 10, 1982); United States v. 156.81 Acres of Land, More or Less, Situate in the County of Marin, State of California, et al., 671 F.2d 336 (9th Cir. 1982); United States v. Certain Lands in Eastham, Truro and Wellfleet, County of Barnstable, Commonwealth of Massachusetts, (D. Mass. May 28, 1982); United States v. 2,175.86 Acres of Land, More or Less, Situated in Hardin and Jefferson Counties, State of Texas, et al., 520 F. Supp. 75 (E.D. Tex. 1981), appeal docketed, No. 81-2402 (5th Cir.); United States v. 59.29 Acres of Land, More or Less, Situated in Hardin County, State of Texas, et al., 495 F. Supp. 212 (E.D. Tex. 1980).

2. The Court of Appeals' decision is in harmony with this Court's decisions in Danforth v. United States, 308 U.S. 271 (1939), and in more recent cases such as Agins v. City of Tiburon, 447 U.S. 255 (1980). In those cases, the Court recognized that the question of whether and when a taking occurs presents issues which must be resolved on a case by case basis. The Court of Appeals correctly applied the teachings of those cases here in

determining when the landowners were effectively deprived of the use and enjoyment of their property to such an extent that a taking had occurred.

3. The Court of Appeals' decision does not unfairly discriminate between owners of developed and undeveloped land by establishing an arbitrary or inflexible distinction between such landowners. Rather, the Court of Appeals' decision recognizes that the status of land as vacant and unimproved is one factor among others to be considered on a case by case basis in determining when a taking in fact occurs. The Court of Appeals' determination that in the circumstances of this case a taking occurred when judgment was entered, because here the condemned property was vacant, unimproved, and not income producing, does not raise issues requiring the attention of this Court.

4. Finally, to require landowners to move for dismissal of a condemnation action in order to ensure due compensation for any increase in the value of condemned property between the date of taking and the date of payment, whether or not the delay in payment was unreasonable, would subject landowners and the courts to a cumbersome and expensive procedure ill-suited to the efficient resolution of condemnation actions. As the Court of Appeals noted, interest is an economical and

effective substitute for the process of computing appreciation for the period between the taking and payment.

Respondent Karen Melchers Stackhouse respectfully requests that the petition of the United States for a writ of certiorari be denied.

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Dated: November 19, 1982